MOHD SALLEH SAMAD *a*

v.

ZAINODIN DONGKING

HIGH COURT MALAYA, IPOH *b*
SU GEOK YIAM JC
[CIVIL APPEAL NO: 12-189-2000]
10 SEPTEMBER 2001

CIVIL PROCEDURE: *Appeal - Facts, findings of - Interference by appellate court - Principles applicable* *c*

ROAD TRAFFIC: *Negligence - Road accident - Independent physical evidence does not support plaintiff's version - Whether defendant's version inherently probable*

ROAD TRAFFIC: *Negligence - Road accident - Guilty plea under s. 43(1) Road Transport Act 1987 - Whether prima facie evidence of party's negligence in subsequent civil trial for damages - Whether open to party to explain why such plea was made* *d*

EVIDENCE: *Prima facie evidence - Guilty plea - Whether prima facie evidence of party's negligence in subsequent civil trial - Whether open to party to explain why such plea was made* *e*

CIVIL PROCEDURE: *Costs - Costs denied to successful party in appeal - On what basis - Rules of the High Court 1980, O. 59 r. 7*

f

This was the appellant's appeal against the decision of the trial judge who allowed the respondent's claim for damages for personal injuries in a road accident. The respondent was riding a motorcycle whilst the appellant was driving a motorcar in the same direction at the time the accident happened. Both parties gave conflicting versions as to how the accident happened. The respondent claimed that the appellant had collided into his motorcycle from the rear whilst the appellant claimed that the respondent was hit by a motorlorry coming from the opposite direction as he (the respondent) was overtaking another motorcar in front of his (the appellant's) car. The trial judge accepted the respondent's version as the appellant failed to give the particulars of the motorlorry that had hit the respondent. Further, the trial judge found that the appellant's guilty plea under s. 43(1) of the Road Transport Act 1987 ('RTA') at the magistrate's court was *prima facie* evidence of the appellant's negligence. The trial judge did not accept the appellant's explanation that he had pleaded guilty simply to avoid having to attend the magistrate's court frequently. *g* *h* *i*

Held:

[1] Notwithstanding that the respondent had been consistent in his version as to how the accident occurred, his version must be supported by the available physical evidence, namely, damage to the rear of his motorcycle. However, there was no independent physical evidence which supported the respondent's version that the appellant had collided into his motorcycle from the rear as there was no damage to the rear of his motorcycle. All the damage to his motorcycle was at the front. Therefore, the trial judge had made a wrong inference when he found that the appellant had collided into the respondent from the rear. (pp 147 g & 148 c)

[2] The court found that the version of the respondent was inherently improbable. An appellate court would not lightly differ from the finding of the trial judge on a question of fact but the perception of facts must be distinguished from the evaluation of facts. Where the only question was the proper inference to be drawn from specific facts and in the instant appeal, the undisputed and unchallenged severe damage to the front portion of the respondent's motorcycle was a specific fact, an appellate court was in an equally good position to evaluate the evidence as the trial judge and it should form its own independent opinion on the conclusion, which should reasonably be drawn, although it will give weight to the opinion of the trial judge. (p 148 e-g)

[3] Since the respondent had failed to prove on the balance of probabilities that the appellant had been negligent in colliding into the rear of his motorcycle, the trial judge should have dismissed the respondent's claim. The trial judge had not taken proper advantage of his having seen and heard the witnesses as there was no evidence to support the inferences made by the trial judge. The appellant's version was inherently probable although the appellant was unable to give particulars of the on-coming lorry. His explanation that he could not do so because the motorlorry did not stop after the collision, was reasonable. Further, the appellant did state in his police report lodged on the same day of the accident that the respondent had collided into an on-coming lorry whilst overtaking a motorcar in front of the appellant's car. In the premises, the appeal should be allowed. (pp 148 h - 149 a-b)

[4] There should be no order as to costs although the appellant had won the instant appeal. Under O. 59 r. 7 of the Rules of the High Court 1980, a successful party can be deprived of his costs if he is guilty of misconduct, negligence or omission. As the plea of guilty by the appellant in the magistrate's court to a charge under s. 43(1) RTA was

a material factor which misled the trial judge into deciding wholly against him when in actual fact the appellant knew that he was not negligent, the appellant should bear his costs of the appeal and also the costs in the sessions court. (p 149 d-f)

[5] The trial judge had misdirected himself when he held that the appellant's plea of guilty constituted *prima facie* evidence of the appellant's negligence. Although a plea of guilty is admissible at common law under the authority of *Holington v. Hewthorne*, it was observed in *Stupple v. Royal Insurance Co* by Denning LJ that a plea of guilty is not to be regarded as conclusive and that it is open to the person who had pleaded guilty to explain in a subsequent civil trial why such a plea was made. (p 149 g-h)

Per curiam:

[1] The rationale behind the order of costs made in the instant appeal was to discourage the practice of parties pleading guilty to charges for traffic offences (where the parties either know or have reason to believe that they were not negligent) because of convenience in order to avoid having to attend court for the trial. It would facilitate more accurate findings in the outcome of civil claims in the lower courts involving road accidents and in the process reduce unnecessary appeals and the incurring of additional costs by the opposing party. If the appellant had not pleaded guilty in the first place, the respondent might not have filed his civil suit and there would have been no necessity for the appellant to defend himself in the civil suit or to prosecute this appeal. (p 150 a-c)

[Appeal allowed; no order as to costs herein; costs by trial judge in lower court affirmed.]

Case(s) referred to:

Bennmax v. Austin Motor Co Ltd [1955] All ER 326 ***(refd)***

China Airlines Ltd v. Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) And Another Appeal [1996] 3 CLJ 163 ***(foll)***

Foong Gun Mooi v. Lim Yeok Soon [1978] 1 MLJ 218 ***(refd)***

Ganeson Perumal & Anor v. Che Tom Man [1991] 3 CLJ 2864; [1991] 2 CLJ (Rep) 629 ***(refd)***

Hollington v. Hewthorne [1943] 1 KB 587 ***(refd)***

Karthiyayani & Anor v. Lee Leong Sin & Anor [1975] 1 MLJ 121 ***(refd)***

Mariam Ahad v. Ernesto A Gacad [1986] 1 MLJ 266 ***(refd)***

Mohamed Abdullah v. Chah Hea Seng [1980] 2 MLJ 282 ***(refd)***

Multar v. Lim Kim Chet [1982] CLJ 107; [1982] CLJ (Rep) 237 ***(refd)***

Noorianti Zainol Abidin & Ors v. Tang Lei Nge [1990] 1 CLJ 943; [1990] 2 CLJ (Rep) 545 ***(refd)***
Stupple v. Royal Insurance Co [1970] 3 WLR 222 ***(foll)***
Yeoh Cheng Han v. Official Administrator, Malaya [1972] 2 MLJ 7 ***(refd)***

Legislation referred to:
Road Transport Act 1987, s. 43(1)
Rules of the High Court 1980, O. 59 rr. 3(2), 7

For the appellant - Kenneth George William; M/s SN Fam & Co
For the respondent - P Suppiah; M/s Chong & Poh

Reported by Usha Thiagarajah

JUDGMENT

Su Geok Yiam JC:

This is an appeal against the decision of the Sessions Court at Teluk Intan. The Sessions Court at Teluk Intan had allowed the respondent's claim for damages for personal injuries sustained in a road accident. The accident occurred on 23 June 1998 at about 10 or 11am along Jalan Teluk Intan/ Parit. It was between a motorcar driven by the appellant and a motorcyclist, the respondent.

On 6 July 2001, after hearing arguments I found the appellant who was the defendant in the court below wholly not liable for the accident and for the injuries and disabilities suffered by the respondent who was the plaintiff in the court below. I reversed the order dated 2 October 2000 of the learned Sessions Court judge, Teluk Intan. I also made no order as to costs in the High Court. I further confirmed the order of costs in the Sessions Court. I said I would give my reasons later. I now do so.

It is not disputed that both vehicles were traveling in the same direction, namely, from Kg. Gajah towards Teluk Intan. However, there are two conflicting versions as to how the collision occurred.

Confronted with the two conflicting versions the learned trial judge chose to believe the respondent's version without considering which of the two conflicting versions was inherently probable or improbable in the light of the physical evidence. In doing so he had misdirected himself on a principle of law.

In *Yeoh Cheng Han v. Official Administrator, Malaya* [1972] 2 MLJ 7 the Federal Court, in allowing the plaintiff's appeal, held that there was no inherent improbability in the evidence of the plaintiff and he was entitled to succeed in his claim.

In *Noorianti bte Zainol Abidin & Ors v. Tang Lei Nge* [1990] 1 CLJ 943; [1990] 2 CLJ (Rep) 545 Lim Beng Choon J (as he then was) had this advice to give regarding the correct approach to be adopted by the trial judge when considering two conflicting stories (at p. 946; p. 549):

> It is useful to pause here for a moment to say a few words regarding the approach which a trial judge should adopt in evaluating the evidence adduced at a trial. It has been stated in numerous cases that the fact that the evidence given by the witnesses of one party was unshaken or unbroken is not *per se* an all sufficient acid test of credibility and that the inherent probability or improbability of the fact in issue must be the prime consideration – see for instance *Muniandy & Ors v. PP*, *Dato Mokhtar bin Hashim v. PP* at p. 247 and *PP v. Neoh Wan Kee* at p. 372. It has also been said that a trial judge should not approach the case upon the basis of deciding which of the two conflicting stories he should believe but rather on the basis of considering which version is inherently probable or improbable – see for instance *Koay Teik Choo & Ors v. R.*

Coming back to the evidence in the instant case, the appellant's version is that after the respondent had overtaken his car, the respondent attempted to overtake another motorcar in front of the appellant's car. While the respondent was in the initial process of overtaking this other car, the respondent collided into the front right side of an on-coming lorry which was travelling in the opposite direction. As a result of the collision, the respondent fell off his motorcycle on to the road while his motorcycle fell on the grass verge on the left side of the road.

On seeing this the appellant panicked, applied his brakes and swerved his motorcar to the left in order to avoid colliding into the respondent. In doing so he collided into the respondent's motorcycle which was on the grass verge. He did not collide into the respondent. He said that the underside of his motorcar had knocked into the engine portion of the motorcycle while it lay on its side on the grass verge.

The respondent's version is that he was riding his motorcycle from Kg. Gajah in the direction of Teluk Intan when he was hit from the rear by a motorcar. He did not know the registration number of the motorcar. After the collision he fell and soon after that he fainted. When he recovered consciousness four days later he was in the Ipoh General Hospital where he remained for 31 days. He suffered severe injuries. He was sure he was hit from behind by a motorcar and not a motorlorry. Prior to the accident he did not overtake any vehicle.

The learned trial judge found as follows: The appellant who was following the respondent from behind had collided into the respondent from the rear.

He gave his reasons as follows:

(1) the road where the accident occurred was a straight stretch of road and there was no obstruction to the view of the road users, thereby inferring that had the appellant kept a proper lookout he would have seen the respondent and taken steps to avoid colliding into the respondent from the rear;

(2) there were blood stains on the left side of the road from Kg. Gajah in the direction of Teluk Intan;

(3) it was difficult for the court to believe the appellant's story that a motorlorry had caused the accident because the appellant had failed to give the particulars of the motorlorry; and

(4) the fact that the appellant had pleaded guilty to a charge under s. 43(1) of the Road Transport Act 1987 in the Parit Magistrate's Court was *prima facie* evidence that the appellant was negligent. He did not accept the appellant's explanation that the appellant had pleaded guilty because the appellant had attended the Parit Magistrate's Court many times and by virtue of that had difficulty in sending his children to school.

In such a situation which involves findings of facts by the learned trial judge the question then arises as to what principles of law should the appellate court apply. The reason is because it is settled law that in an appeal, where facts have to be received, it is undesirable that the findings of fact by the trial judge should be disturbed by an appellate court.

This question has been comprehensively addressed in the case of *China Airlines Ltd v. Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and Another Appeal* [1996] 3 CLJ 163, where Mohamed Dzaiddin FCJ (as His Lordship then was), in delivering the judgment of the Federal Court, held as follows at p. 175:

> *Relevant principles of law*
>
> In the light of the above findings of the learned judge, *a fundamental question of principle arises – which is, whether in the circumstances of the case this court can interfere with the findings of fact of the court below. It is a settled principle of law that in an appeal, where facts have to be received, it is undesirable that the findings of the court below should be disturbed by a court of appeal unless it appears that those findings are clearly wrong, and more especially that it is undesirable to do so where the conclusions reached must to a large extent depend on the credibility of the witnesses and the impression formed by a court which has seen them*

and can judge their honesty and accuracy (*Crofter Hand Woven Harris Tweed Co Ltd & Ors v. Veitch & Anor* [1942] 1 All ER 142 (HL) per Lord Porter at p. 167). However, the authority for the above proposition is the speech of Lord Thankerton in *Watt (or Thomas) v. Thomas* [1947] 1 All ER 582, particularly the following passage (at p. 587):

> I Where a question of fact has been tried by a judge without a jury and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion.
>
> II The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.
>
> III The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.

On the other hand, *there is a clear authority also from the House of Lords – and followed by the Privy Council – which says that a distinction can be drawn between a finding of a specific fact which depends upon the credibility of witnesses and a finding of fact which depends upon inferences drawn from other facts. In the latter case, an appellate court will more readily interfere with the trial judge's findings of fact and form an independent opinion than in the case of the former.* That authority is the speech of Lord Reid in the House of Lords' decision in *Benmax v. Austin Motor Co Ltd* [1955] 1 All ER 326, followed later by the Privy Council in the Singapore case of *Tay Kheng Hong v. Heap Moh Steamship Co Ltd* [1964] MLJ 87 at p. 94. At p. 329, his Lordship stated:

> *Watt (or Thomas) v. Thomas* [1947] 1 All ER 582 was a *consistorial* case based on cruelty, and I think that the whole passage which I have quoted refers to cases where the credibility or reliability of one or more witnesses has been in dispute, and where a decision on these matters has led the trial judge to come to his decision on the case as a whole. If that be right, then I see no reason to doubt anything that was said by Lord Thankerton. *But in cases where there is no question of the credibility or reliability of any witness, and in cases where the point in dispute is the proper inference to be drawn from proved facts, an appeal court is generally in as good a position to evaluate the evidence as the trial judge, and ought not to shrink from that task, though it ought, of course, to give weight to his opinion.* (emphasis added)

In *Karthiyayani & Anor v. Lee Leong Sin & Anor* [1975] 1 MLJ 121, Raja Azlan Shah FJ (as His Royal Highness then was) in allowing an appeal against the decision of the trial court held, *inter alia*, that the learned trial judge had wrongly made findings of fact as to the speed of the car and its going on the grass verge which were not supported by the evidence.

In *Multar v. Lim Kim Chet* [1982] CLJ 107; [1982] CLJ (Rep) 237 the Federal Court in allowing the appellant's appeal against the decision of the High Court at Johor Bahru dismissing the appellant's claim for damages for personal injuries sustained in a road accident had this to say [1982] CLJ (Rep) 237 at p. 241:

> We are loath to disturb the findings of facts by the trial court. But in the circumstances of this case, we find that we have to interfere as we are satisfied that crucial evidence has been misconstrued resulting in the uncertainty of the first respondent's evidence as to how he came in contact with the motorcycle being put in a favourable light and the consistency of the appellant's evidence being disregarded. On the evidence before the court, we are satisfied that the first respondent was wholly to blame for the accident.

In *Foong Gun Mooi v. Lim Yeok Soon* [1978] 1 MLJ 218, the Federal Court, in allowing the appellant's appeal, held that as there was no evidence to support the inferences made by the learned trial judge, the judgment finding the motorist equally to blame for the accident could not stand. The Federal Court further held that the evidence clearly pointed to the entire negligence of the motor cyclist.

Bearing in mind the principles laid down in the cases cited by Mr Kenneth George William, the learned counsel for the appellant, and referred to herein I shall now evaluate the evidence in the present appeal against the backdrop of the respondent's statement of claim.

The respondent, in para. 3 of his statement of claim, has alleged that the collision was caused wholly or partly by the appellant's negligence. Under the heading "Butir-butir kecuaian" he has listed down ten particulars of the appellant's alleged negligence. According to the respondent, these particulars of negligence support the respondent's case that the appellant was negligent when he drove his motorcar too fast, failed to keep a proper look out, drove too closely behind the respondent, failed to apply his brakes to avoid colliding into the respondent and colliding into the respondent.

In para. 4 of the respondent's statement of claim, the respondent has also relied on the doctrine of *res ipsa loquitur*.

In his oral testimony in court, the evidence which he gave is similar to his allegations as averred in his statement of claim. He lodged a police report on 11 November 1998, some four months after the accident because after his discharge from the hospital he could not walk.

He relied on his police report, P2, in which he had said that he was collided into from the rear by a motorcar which was travelling at a fast speed. Although he did not see the motorcar prior to the collision he was definite that it was a motorcar and not a motorlorry. He was familiar with the road because he had used the road before. He was riding his motorcycle at a speed of 40-50 kph.

After the collision, he fell. He was able to sit up for a while before losing consciousness. His motorcycle fell down on the road in front of him. He denied that his motorcycle had fallen down on the grass verge by the side of the road as shown in the police photograph, P3A.

He also denied amongst other suggestions put to him in cross-examination that the appellant had only collided into his motorcycle and did not at any point of time collide into him. He also denied that the injuries and disabilities suffered by him arose out of the collision between his motorcycle and the motorlorry which had come from the opposite direction. He further denied that he was speeding and that the collision had occurred because of his negligence.

So far, there is consistency in the respondent's version as set out in his statement of claim, his police report, P2, and his oral evidence in court that he was collided into from the rear by the appellant's motorcar. Notwithstanding that the respondent has been consistent in his version as to how the accident occurred, his version must be supported by the available physical evidence, namely, damage to the rear of his motorcycle.

However, I am unable to find any independent physical evidence which supported the respondent's version that the appellant had collided into the rear of his motorcycle. To my mind if it is true that the appellant had collided into the rear of the respondent then surely the rear of the respondent's motorcycle would have been damaged. But this is clearly not so.

The investigating officer (IO), Sgt. 51181 Yop Mohd Zin, having passed away in September 1998, the respondent had called SP2, Chief Inspector Mohd Isa Hj Naim, the Head of the Traffic Branch of the Perak Tengah Police District Headquarters, to testify as to the damage to the respondent's motorcycle. His evidence which appears on p. 124 of the Appeal Record is based on the investigation diary of the IO. He has testified that there were nine items of damage to the respondent's motorcycle.

Strangely enough, this evidence minus the first item, namely, "rosak teruk di bahagian depan", appears in the learned trial judge's grounds of judgment on p. 10 of the Appeal Record.

SP2 further testified that other than the nine items of damage to the respondent's motorcycle as recorded by the I.O., namely, "rosak teruk di bahagian depan, rim depan bengkok, tayar depan pecah, fork depan patah dan tercabut, mudguard depan pecah, lampu besar depan pecah, nombor plet depan patah, brek kaki bengkok sebelah kanan" and "pemijak kaki kanan bengkok", there was no recording of any other damage to the respondent's motorcycle made by the IO.

In my opinion, it is manifestly clear that the learned trial judge had made a wrong inference when he found that the defendant had collided into the rear of the plaintiff's motorcycle when there was absolutely no damage to the rear of the plaintiff's motorcycle and all the damage to the plaintiff's motorcycle was at the front.

In view of the independent physical evidence the court finds the version of the respondent inherently improbable. In doing so, I am mindful of the principle already mentioned earlier on in this judgment that normally an appellate court would not lightly differ from the finding of the trial judge on a question of fact but the perception of facts must be distinguished from the evaluation of facts. Where the only question is the proper inference to be drawn from specific facts and in the instant appeal, the undisputed and unchallenged severe damage to the front portion of the respondent's motorcycle is a specific fact, an appellate court is in an equally good position to evaluate the evidence as the trial judge and should form its own independent opinion on the conclusion which should reasonably be drawn although it will give weight to the opinion of the trial judge. (See *Bennmax v. Austin Motor Co Ltd* [1955] All ER 326, *Mohamed bin Abdullah v. Chah Hea Seng* [1980] 2 MLJ 282 and *Ganeson a/l Perumal & Anor v. Che Tom bte Man* [1991] 2 CLJ 2864; [1991] 2 CLJ (Rep) 629).

Since the respondent had failed to prove on the balance of probabilities that the appellant had been negligent in colliding into the rear of his motorcycle thereby causing him to suffer injuries, disabilities and loss, the learned trial judge should have dismissed the respondent's claim instead of finding the appellant wholly liable and giving judgment in favour of the respondent. In arriving at this decision the learned trial judge had not taken proper advantage of his having seen and heard the witnesses as there is no evidence to support the inferences made by the learned trial judge. I found the appellant's version inherently probable although the appellant

was unable to give the particulars of the on-coming lorry. I accepted his explanation that his inability to do so was because the motorlorry did not stop after the collision with the respondent's motorcycle because it was reasonable. Further the appellant did state in his police report, D6, which was lodged on the same day of the accident that the respondent had collided into an on-coming lorry whilst overtaking a motorcar in front of the appellant's car. In the premises, I allowed the appellant's appeal.

I shall now deal with the issue of costs. The Courts of Judicature Act 1964 confers power on the court to award costs. It is settled law that although the discretion of the court is very wide it is to be exercised judicially and on established principles. I have ordered that there be no order as to costs in the instant appeal although the appellant has won his appeal in the High Court. I have also confirmed the order of the Sessions Court awarding costs to the respondent.

This would seem odd since costs usually follow the event. The general rule that the successful party gets the costs of and incidental to the proceedings except when it appears to the court that in the circumstances of the case some other order should be made as to the whole or any part of the costs, is contained in O. 59 r. 3(2) of the Rules of the High Court 1980. The reason why I have done this is because of r. 7 of the same Order and the conduct of the appellant in pleading guilty to a charge under s. 43(1) of the Road Transport Act 1987 in the Parit Magistrate's Court. Under that rule, a successful party can be deprived of his costs if he is guilty of misconduct, negligence or omission. In my view as the plea of guilty by the appellant was a material factor which misled the learned Sessions Court judge into deciding wholly against him when in actual fact the appellant knew that he was not negligent when he collided into the engine of the respondent's motorcycle as it lay on the grass verge, the appellant should bear his costs of the appeal and also the costs in the Sessions Court.

The learned trial judge had misdirected himself when he held that the appellant's plea of guilty constituted *prima facie* evidence of the appellant's negligence. Although a plea of guilty is admissible at common law under the authority of *Hollington v. Hewthorne* [1943] 1 KB 587, Denning LJ observed in *Stupple v. Royal Insurance Co* [1970] 3 WLR 222 that a plea of guilty is not to be regarded as conclusive and that it is open to the person who had pleaded guilty to explain in a subsequent civil trial why such a plea was made. (See also *Mariam bt. Ahad v. Ernesto A Gacad* [1986] 1 MLJ 266)

The rationale behind the order of costs made in the instant appeal is to discourage the practice of parties pleading guilty to charges for traffic offences involving driving a vehicle or riding a vehicle without due care and attention and in the process a collision occurs in situations where the parties either know or have reason to believe that they were not negligent at all and they were doing so because of convenience in order to avoid having to attend court for the trial. It would facilitate more accurate findings in the outcome of civil claims in the lower courts involving road accidents and in the process reduce unnecessary appeals and the incurring of additional costs by the opposing party. If the appellant had not pleaded guilty in the first place, the respondent may not have filed his civil suit and there would have been no necessity for the appellant to defend himself in the civil suit or to prosecute this appeal.